INDEX

	Page
PRELIMINARY STATEMENT	1
SPECIFIC REASONS WHY THIS COURT SHOULD WRITE AN OPINION ON THE MERITS	3
CONCLUSION	9

CITATIONS

CASES:

Brown Shoe Co. v. United States, 370 U.S. 294	3, 5, 6
Mills v. Hoag, 7 Paige, 19	4
Ohio v. Price, 360 U.S. 246	2
Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (19 How.) 421 (1856)	5, 6, 8
State of Louisiana v. Murphy, 173 F. Supp. 782	2
Stoval v. Banks, 77 U.S. 1036	4
Two Guys From Harrison-Allentown, Inc. v. McGinley, 179 F. Supp. 944	2

STATUTES AND RULES:

Bank Merger Act, Section 2	3, 6
Federal Rules of Civil Procedure, Rule 60(b)	2
Sherman Act, Section 1	6
Section 2	6

MISCELLANEOUS:

66 Col. Law Rev.	8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1270

DAGES I. BOYLE, *Appellant*

v.

UNITED STATES OF AMERICA, FIRST NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, SECURITY TRUST COMPANY, AND FIRST SECURITY NATIONAL BANK AND TRUST COMPANY OF LEXINGTON

On Appeal From the United States District Court for the Eastern District of Kentucky

---

PETITION FOR REHEARING

PRELIMINARY STATEMENT

Boyle and the two banks he represents file this petition solely for the purpose of urging that this Court should in the interest of justice and sound legal precedent write a complete, reasoned opinion on the merits.

This is necessary because of the patent errors and inconsistencies in the opinion of the district court (280 F. Supp. 260, J.S. pp. 2a-8a).[1]

Affirmance of the district court's decision by the Opinion *per curiam* of this Court without discussion of the law or facts amounts to an approval or adoption of its opinion by this Court. See *Ohio* v. *Price,* 360 U.S. 246; *Two Guys From Harrison-Allentown, Inc.* v. *McGinley,* 179 F. Supp. 944; and *State of Louisiana* v. *Murphy,* 173 F. Supp. 782.[2]

Unless this Court makes available in an opinion the reason for its decision, the law will be in a state of confusion as to:

(a) When a judgment is final;

(b) When a court judgment is free, if ever, from impairment or vacation by subsequent legislation;

(c) Whether there is a procedure for vacating a final court judgment other than that set forth in the Federal Rules of Civil Procedure, particularly Rule 60(b) (See J.S. p. 29);

(d) Whether a district court may ignore a mandate of this Court which has not been withdrawn or modified by this Court (See J.S. pp. 28-29); and

(e) Whether a consent judgment to which intervening parties have not consented may be entered.

---

[1] J.S. refers to Boyle's Jurisdictional Statement. The so-called consent judgment appealed from is "made a part of the opinion." J.S. p. 2a.

[2] The foregoing cases have not been previously cited to the Court in this case.

SPECIFIC REASONS WHY THIS COURT SHOULD WRITE AN OPINION ON THE MERITS

1. The most compelling reason for an opinion on the merits arises out of the following facts and circumstances:

The district court rested its holding that the Bank Merger Act of 1966 *constitutionally* (a) *impaired* valuable private rights fixed by the March 18, 1965 judgment[3] entered in accordance with the final judgment of this Court (376 U.S. 665) and (b) vacated those judgments solely upon the fallacious holding that the March 18, 1965 judgment "was not final" because it retained the case on the docket for future directions. The district court said (J.S. pp. 7a-8a):

> "The attack upon the Bank Merger Act of 1966 as unconstitutional is not well taken. *The litigation was not final,* notwithstanding the fact that an order directing divestiture had been entered, as the order itself retained the case on the docket for the purpose of guiding and determining whether or not any action on the part of the defendants contravened the directive of the order." (Emphasis added)

---

[3] The March 18, 1965 order of divestiture and the clarification order of April 29, 1965 are set forth in J.S. pp. 20a and 22a, and are collectively referred to herein as the "March 18, 1965 judgment." It appears that this was the only unappealable and unreviewable judgment to which Section 2(a) of the Bank Merger Act of 1966 could apply. Other judgments in bank merger cases in existence at the time of enactment of this Act were subject to appeal or rehearing and thus, private rights thereunder could be affected by subsequent legislation. See cases cited in J.S. pp. 17-18. Therefore, this case is entirely different from other bank merger cases pending at the time of enactment of the Bank Merger Act of 1966. Enforcement of private rights under the March 18, 1965 judgment would not affect such other litigation.

In short, the district court held the Bank Merger Act of 1966 constitutional as applied to the aforesaid judgments solely because of its erroneous conclusion that the March 18, 1965 judgment "was not final." The holding that the March 18, 1965 judgment "was not final" is directly contrary to, and *if approved by the Opinion per curiam overrules, Brown Shoe Co.* v. *United States,* 370 U.S. 294, other cases cited in J.S. pp. 19-21, and *Stovall* v. *Banks,* 77 U.S. 1036, (not previously cited) which uniformly hold that retention of a case on the docket for future directions does not destroy the finality of the judgment.[4]

Furthermore, *the holding that the March 18, 1965 judgment "was not final" is contrary to and inconsistent with the district court's own holding that the so-called consent judgment (entered 2⅔ years later) is a "final judgment."* The district court's opinion calls that judgment the "final judgment" *nineteen* times. See J.S. pp. 10a-14a. However, *the consent*

---

[4] In the *Stovall* case this Court said:

"It is not unusual in courts of equity to enter decrees determining the rights of parties, and the extent of the liability of one party to the other, giving at the same time a right to apply to the court for modifications and directions. *It has never been doubted that such decrees are final.* They are all that is necessary to give to the successful party the full benefit of the judgment. In 2 Daniell's Chancery Practice, 641, 642, the effect of allowing the privilege of making such applications to the *Chancellor,* is stated to be no alteration of the final nature of the decree. Says the author, 'A decree with such a liberty reserved is still a final decree, and, when signed and enrolled, *may be pleaded in bar to another suit for the same matter.*' So in *Mills* v. *Hoag,* 7 Paige, 19, it was said that 'a decree is not the less final in its nature, because some future orders of the court may possibly become necessary to carry such final decree into effect.'" (emphasis added)

judgment also provides for retention of the case on the docket in the same language and for the same purposes that the March 18, 1965 judgment did. See J.S. pp. 14a and 22a for exact language by which each judgment retained the case on the docket.[5] The consent judgment is not final *if* the March 18, 1965 judgment is not final.

If the March 18, 1965 judgment is a final judgment, as clearly it is, then the Opinion per curiam overrules the Wheeling Bridge case (59 U.S. 421) and other cases cited in J.S. pp. 17-23 which (without exception) hold that private rights vested by a final judgment cannot be impaired by legislation enacted after the time for appeal or review of that judgment expired.

The conclusion is inescapable that either the *Brown Shoe* line of cases or the *Wheeling Bridge* line of cases is overruled by the Opinion *per curiam*. However, it is impossible to ascertain which one is overruled because the *per curiam* opinion of this Court gives no indication as to which of the inconsistent holdings of the district court is adopted.

The uncertainty as to which line of decisions is overruled and the resulting confusion establishes the necessity for a complete, reasoned opinion on the merits.

---

[5] The district court correctly recognized that a *final* judgment that fixes private rights cannot be vacated or impaired by legislation enacted after expiration of the time for appeal or review of the final judgment. See cases cited in J.S. 17-18. However as shown by the *Brown Shoe* case and other cases cited above, the district court erred when it held that the March 18, 1965 judgment was not "final." Apparently, except for this error, the district court would have held the *Act unconstitutional as applied to the March 18, 1965 judgment*. This error was prejudicial. It was decisive of the case before the district court, and should be corrected.

2. Other reasons an opinion on the merits is essential are as follows:

(a) The district court's erroneous holding that the Bank Merger Act of 1966 immunizes the consolidation of the Lexington banks against attack for violation of Section 2 of the Sherman Act is directly contrary to *express* provisions of Section 2(a) of the Bank Merger Act of 1966 and should be corrected.

(b) The district court's erroneous holding that Congress by creating the conclusive[5] presumption[6] (adjudication) that the consolidation of the Lexington banks did not violate Section 1 of the Sherman Act was a determination of a "question of fact" (J.S. p. 8a) should be corrected. It was not proper for Congress to adjudicate *whether that statute had been violated* because, irrespective of whether that question was "a question of fact" it had already been resolved by the final judgment of this Court, and as stated by Chief Justice Warren in the *Brown Shoe* case, that question was "forever foreclosed" by the final judgment of this Court. It was *res adjudicata.*

(c) The district court's erroneous holding that the *Wheeling Bridge* case upholds the *constitutionality* of the Bank Merger Act of 1966 as applied to the March 18, 1965 judgment and the final judgment of this Court (J.S. p. 8a) should be corrected. That case establishes that the Act is *unconstitutional* insofar as it impairs private rights fixed by those final judgments because it held that a private right to payment of court costs awarded by a final decree of this Court could not be impaired by legislation enacted subsequent to the final decree *even though the enactment occurred prior to*

[5] See Section 2(a) of the Bank Merger Act of 1966.

satisfaction or execution of the decree. See other cases in J.S. pp. 23-25.

(d) The district court's opinion fails to state any valid reason why the private rights of Boyle and the banks he represents cannot be enforced. The Petition of First Security to clarify the March 18, 1965 judgment[7], the Response of the United States[8] and the March 18, 1965 judgment (which includes the April 29, 1965 Clarification Order) *speak for themselves* and leave no room for doubt that substantial private rights were fixed by the March 18, 1965 judgment which ordered divestiture "without delay." See J.S. pp. 11-12, 23-25 for summarization of these rights.

Appellee banks in their Motion to Affirm recognize and describe Boyle's private rights as "[h]is relative equity in the two banks after execution of the decree." This "equity" is a bundle of private rights fixed by the March 18, 1965 judgment.

Similarly, the equities of the two banks required to be recreated or re-established are bundles of private rights *fixed by that judgment.*

Appellee banks in their Motion to Affirm at p. 19 admit:

> "The Court acknowledged in *Wheeling Bridge* that, as a general principle, when a court renders a final judgment with respect to the private rights of parties, the rights become *absolute* and *must be enforced.*" (Emphasis added)

However, for one nebulous reason or another, Boyle's rights and the rights of the banks he represents are

[7] Doc. 186.

[8] Doc. 188.

not being "enforced," although Boyle in his intervening complaint specifically requested enforcement of these rights. *No court has yet cited a case or stated a sound legal or logical reason why these rights cannot be enforced. They should be enforced.*[9] *It is respectfully submitted that this Court should, in view of the errors in the district court's opinion, set forth in an opinion on the merits, the legal principles which underlie its decision.*

CONCLUSION

For reasons stated herein and in the Jurisdictional Statements of Boyle and Central Bank & Trust Co., (No. 1269), this Court should withdraw its Opinion *per curiam* and note probable jurisdiction. The opin-

---

[9] If there was ever a case, where a "divestiture" should be carried out, it is this case. The record is clear that the banks consolidated knowing that the United States believed the consolidation would violate the antitrust laws, and that it would sue to enjoin it. However, the banks claim to have "consummated" the consolidation during the morning of March 1, 1961 just before the suit was filed that day. They knew at that time that representatives of the United States were in Lexington for the purpose of filing the injunction suit. See J.S. pp.7-9 and "The 1966 Amendment to the Bank Merger Act", Vol. 66, Columbia Law Review, pp. 764, at 775. *There is no merit whatsoever in the contention that the banks innocently entered into this consolidation believing that the Sherman Act would not apply.* The record refutes that contention. It would be a rank miscarriage of justice to fail to enforce the March 18, 1965 final judgment of the district court and the final judgment of this Court.

ion of the district court should not be allowed to become the law of the land.

Respectfully submitted,

EARL S. WILSON
EDWIN F. SCHAEFFER, JR.
Central Bank Building
Lexington, Kentucky 40507

FRANK S. GINOCCHIO
Bank of Commerce Building
Lexington, Kentucky 40507

Attorneys for Appellant

Of Counsel:

KINCAID, WILSON & TRIMBLE
Central Bank Building
Lexington, Kentucky 40507

June 1968

Certificate

I certify that this Petition for Rehearing is presented in good faith and not for delay.

Earl S. Wilson